



## Transcript of Proceedings

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Date: 10 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 878 of 1997

GONCALO FILIPE COELHO

Plaintiff

and

RONALD T TODD

First Defendant

and

YUSUFALI JANUWALA

Second Defendant

BRISBANE

..DATE 26/06/2003

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for summary judgment made pursuant to rule 292 by the defendants against the plaintiff. The proceedings are to recover damages for alleged professional negligence of the defendants in relation to an operation in 1994. The first defendant was the surgeon, the second defendant assisted him and referred the plaintiff to the first defendant.

Broadly speaking, the claim against the first defendant is for the negligent performance of the operation and the claim against the second defendant is a similar one with the additional allegation that the plaintiff was not warned or sufficiently warned of any possible side effects of the procedure.

The proceeding was commenced in 1997 just within, it is said, a relevant period of limitation and the proceedings have been hardly prosecuted with proper expedition since. For much of the period since the proceedings were commenced the plaintiff has been legally represented but solicitors - or his most recent solicitors withdrew as solicitors on the record at the beginning of May this year.

The plaintiff's pleading does not particularise any negligence involved in the allegedly negligent surgery but instead it expressly invokes the principle of *res ipsa loquitur* by saying, in effect, that from and after this operation in 1994 the plaintiff has suffered from a number of conditions and complaints which have affected him in various ways personally

and financially, and that the inference should be drawn that they are, in substance, attributable to the operation because of the direct correspondence between the commencement of them and the operation.

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The defendants have, in support of their cases, some medical opinion apparently obtained, in some cases at least, not with a view to an ultimate hearing of this matter but perhaps for purposes more concerned with the treatment of the plaintiff which, with one possible exception, would appear to strongly support their case.

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In other words, there is certainly expert evidence apparently available to the defendants to the effect that the matters complained of are not at all to be expected from an operation of this kind and that they are unrelated to that surgical procedure.

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The possible exception is a report from Dr Wall dated 7 June 2000. He saw the plaintiff on 6 June 2000 and in that report after setting out in summary the complaints made by the plaintiff, that is, his alleged symptoms, he said:

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"The assessment based on the above information currently is that Mr Cochlo has a complex system of autonomic and somatic neurological disturbances which date from the bilateral inguinal hernia repair carried out in Ipswich in 1994. While no cause has been established, it is important to observe the precautionary principle that the patient's illness should be managed to the best of our knowledge and competence. It is therefore necessary to keep an open mind and consider alternative explanations

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such as spinal disease and sacroiliac disease. This will be pursued further."

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At present it is not entirely clear to me that Dr Wall's report was unequivocally adverse to the plaintiff's case. It may be that an explanation of it, especially by Dr Wall, would show that it is but my doubt about that comes from the difficulty in assessing in the context of applications of this kind, the effect of expert evidence where that is in the form of a letter and without an explanation in an affidavit or by oral evidence.

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That then is the possible exception to what I have said is otherwise the effect of the evidence in the form of various medical reports, none of which postdate Dr Wall's report which, as I have mentioned, are certainly against the merits of this proceeding.

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It is likely that Mr Coelho, if judgment is not given here, would conduct the case himself at any trial. I pressed him to explain how it was that he hoped to prove his case. It is, of course, a highly unusual thing for someone to attempt to prove professional negligence without the benefit of some professional opinion given in evidence in favour of that case.

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It seems however that if this matter goes to trial he would propose to give evidence giving a detailed account perhaps by reference to some medical records of everything which he claims he has suffered from since the time of this operation.

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Now it might be said that in answer to this application he should have himself sworn an affidavit setting out those matters so that the effect of that evidence could be tested against the evidence which I have mentioned for the defendants.

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In this case however whether or not it is his own fault he is not legally represented and I also have the impression that English is not his first language. It seems to me that the Court should not be too demanding in this context in requiring him to meet this application by an affidavit one would expect of a legally represented person.

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As I see it, there is some real prospect that at a hearing he would be able to give an account of what has happened in his life since 1994 which could, and I put it no higher than that, provide some case to answer. It would then be a matter for the defendants to meet that case by expert opinion or otherwise.

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In other words, I can't conclude at present that there is a prima facie case but that is not the question upon this application where, according to rule 292, the defendants must establish that the plaintiff has no real prospect of succeeding. A very slim prospect might still be a real prospect.

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It also seems to me that there are some other matters which are relevant to the exercise of a discretion under rule 292 if

JUDGMENT

it be the case that the material establishes that there is at present apparently no real prospect of success. One of those is that if the matter is as clear as the defendants contend it is and it may ultimately be held, the likely duration of any trial should be very short and one would expect perhaps within one day.

There is, of course, a delay involved in waiting for a hearing of the matter but in the overall scheme of things in relation to a case which has been going since 1997 it does not seem to me that whatever delay is involved in waiting for a hearing of the order of one or two days is significant.

In the circumstances then it is my view that the application should be dismissed. As to costs the plaintiff is unrepresented and therefore would appear to have no costs of his own.

In any event it seems to me that the costs of this application ought be reserved because if the action is ultimately revealed to have no merit the defendants ought to have their costs of this application as well as of the proceedings generally.

Do you have anything to say about the reservation of costs?

MS ROSENGREN: Nothing further, thank you, your Honour.

HIS HONOUR: The orders will be then that the application be dismissed and that the costs be reserved.

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HIS HONOUR: The further orders will therefore be as follows:

1. That the plaintiff will give disclosure of documents on or before 17 July 2003.

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2. That there be an exchange of expert reports by the end of September 2003.

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3. That the proceedings be placed upon the call over list.

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